

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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77-1364

To be argued by
JONATHAN M. MARKS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1364

UNITED STATES OF AMERICA,

—against—

ANNETTE BONEY,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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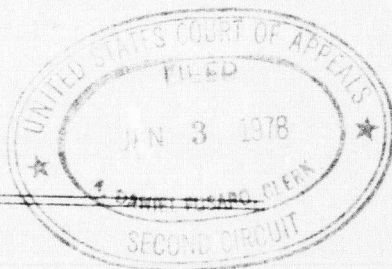


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BRIEF FOR THE APPELLEE

Preliminary Statement

In this consolidated appeal, appellant Annette Boney appeals from judgments of conviction entered on August 18, 1977 and September 29, 1977 after jury trials in the United States District Court for the Eastern District of New York (Mishler, *C.J.*). At the first trial, appellant was found guilty under Count Three of the indictment of possessing with intent to distribute 20 kilograms of methaqualone, a controlled substance, in violation of 21 U.S.C. § 841(a)(1). At that trial, she was acquitted on a second count of possession under Section 841(a)(1) and one count of distribution under the same section. In the second trial, appellant was found guilty of one count of conspiracy to possess and distribute methaqualone, in violation of 21 U.S.C. § 846. A co-defendant, Stuart First, was acquitted. Upon her first conviction, Annette Boney was committed for study and report under 18

U.S.C. § 5010(e). Upon her second conviction, she was committed for study and report under 18 U.S.C. § 4205 (c). Execution of her commitment has been stayed pending this appeal.

Appellant contends here that the evidence was insufficient to support the possession conviction; that the trial judge gave an erroneous jury instruction on the possession count; that the conspiracy conviction should be reversed because the Government failed to disclose in timely fashion, or to make available, certain materials and information pertaining to the testimony of an expert witness; and that the indictment should be dismissed because the procedure by which methaqualone was added to the schedule of controlled substances in 21 U.S.C. § 812 was an unconstitutional delegation of legislative authority.

Statement of Facts

A. The May 1977 Trial

1. Pretrial Proceedings

Annette Boney was initially indicted alone on one count of possessing with intent to distribute about 60,000 tablets of methaqualone¹ on November 17, 1976, in violation of 21 U.S.C. § 841(a)(1), one count of distributing methaqualone on that date in violation of the same section, and a third count of possession, which read as follows:

COUNT THREE

On or about the 21st day of December, 1976, within the Eastern District of New York, at

¹ Tablets of methaqualone, a schedule II non-narcotic controlled substance, are commonly called "qualudes" and are referred to as such in this brief.

John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant Annette Boney did knowingly and intentionally possess with intent to distribute approximately 20 kilograms of Methaqualone, a Schedule II controlled substance. (Title 21, United States Code, Section 841(a)(1)).

On the morning of May 2, 1977, a grand jury returned a superseding indictment, which was identical to the initial indictment except that it included a fourth count charging Annette Boney and one Stuart First with conspiring under 21 U.S.C. § 846 to possess and distribute approximately 129,300 tablets of methaqualone from October 22, 1976 through January 10, 1977.

That same morning, in explaining to the court why the conspiracy count had been added, the Assistant United States Attorney made the following statement:

MR. MARKS [the Assistant United States Attorney]: One of the counts [Count Three] charges the defendant with possessing these drugs in the Eastern District. Our theory is even though she was not in the district, she was in Texas, that she had constructive possession of those pills when she had them shipped up here by air freight and when they arrived at Kennedy Airport, but just so there is no question about that, about venue, we felt that it was wise—[to add the conspiracy count].

THE COURT: You mean as to one of the counts.

MR. MARKS: Yes, your Honor.

THE COURT: Who possessed it?

MR. MARKS: The Government's proof will show the defendant.

THE COURT: Who possessed it here in the Eastern District? Who physically possessed it.

MR. MARKS: The agents picked it up at the airport. (Tr. 6-7).²

Immediately thereafter, appellant made pretrial motions challenging the sufficiency of the evidence presented to the grand jury (Tr. 8-14), to suppress tape recorded conversations (Tr. 22-25), for an audibility hearing (Tr. 25-32), and for the suppression of evidence concerning the purchase of a gun (Tr. 32-33). The motions were denied. The appellant made no other pretrial motions. It was agreed at that time that the trial would proceed on the original three counts and that the conspiracy count would be severed.

2. The Evidence Relating to the November 1976 Transactions

The trial began later that day. The Government's principal witness was Michael Cantor, who had plead guilty to a violation carrying a maximum penalty of four years' imprisonment in satisfaction of all charges involving methaqualone that could be brought against him in return for his cooperation (Tr. 55-57).

Cantor testified that he met Annette Boney in October 1976 in Dallas, Texas (Tr. 57-58). Cantor was a salesman for a sweater importer, and Annette Boney, who lived in Dallas, was working for one Stuart First, the concern's sales representative in Texas. Cantor and Boney met at a clothing showroom where Cantor was showing his line of sweaters (Tr. 54-55, 57). Appellant told Cantor at their first meeting that she could supply him with any quantity of qualudes that he wanted, and she agreed to sell him twenty thousand tablets for between \$1.95 and \$2.00 a tablet (Tr. 59-60).

² Page references are to the trial transcripts.

On October 28 or 29, 1976, Annette Boney came to New York, and Cantor gave her \$29,000 in cash (Tr. 63-64). A day or two later, Boney and Stuart First arrived at Cantor's apartment in Forest Hills, Queens, with two suitcases filled with qualudes (Tr. 64).

The next week, Boney agreed to sell an additional forty thousand tablets to Cantor for \$68,000 (Tr. 67). On November 16, 1976, Cantor gave Boney the money for the second shipment, and the following day Boney arrived at Cantor's apartment with sixty thousand tablets (Tr. 69-70). Among the people at Cantor's apartment when Boney arrived were Robert Goldman, a friend of Cantor's (Tr. 70). Robert Goldman testified that on November 16 he was in Michael Cantor's apartment when Annette Boney arrived carrying two suitcases containing qualudes (Tr. 2.145, 2.147-2.148). Counts One and Two of the indictment were based on the November 16 transaction. She was acquitted on those counts.

About a week later, Cantor testified, Boney said that she would be arriving in New York around November 29 with an additional twenty-four thousand qualudes (Tr. 72). Cantor met her at LaGuardia Airport, and the two of them went to the Plaza Hotel, where Boney gave the qualudes to Cantor (Tr. 72-73). Before Boney went back to Texas, Cantor gave her about \$40,000, leaving a balance due of \$7,500. Cantor paid her that money by sending three separate money orders for \$2,500 a piece, using Robert Goldman's name as the sender on one of the money orders (Tr. 72-73). The Western Union confirmation for that money order was received in evidence (Tr. 73, 2.155; Gov. Ex. 8).

3. The Evidence on Count Three

Cantor was arrested by agents of the Drug Enforcement Administration on December 20, 1976. The follow-

ing day, he began to cooperate with the Government. On December 21, Cantor received a telephone call, which he recorded, from Boney. In the course of that conversation, Boney told Cantor that she had sent him "twenty five six" in "spring samples" by Emery Air Freight and that they could be picked up at John F. Kennedy International Airport. Boney said that the "samples" were in a suitcase addressed to Cantor's company and marked to his attention (Tr. 2.5-2.7, 2.17-2.18). The tape recording of that conversation was played for the jury.

On December 21, 1976, after receiving the phone call, Cantor, accompanied by agents of the Drug Enforcement Administration, went to Kennedy Airport, where they took custody of the suitcase. It contained approximately 25,300 methaqualone tablets (Tr. 2.19-2.20, 2.206).

On December 28, Cantor told appellant in another telephone conversation that he had given the pills which he picked up at the airport to someone named Jerry, that Jerry had been robbed of the pills, and that, consequently, Cantor could not pay appellant (Tr. 2.21-2.23; Gov. Ex. 5). The recording of that conversation was also played for the jury. Following the conversation, Cantor and Agent Gerald Graffam of the Drug Enforcement Administration (then acting in an undercover capacity) met with Annette Boney and told her what efforts they were making to raise the \$50,000 that Cantor owed her (Tr. 2.53-2.54).

On January 4, 1977, Cantor recorded another telephone conversation with appellant, who was in Texas, in which he related the efforts he was making in order to get the \$50,000. Annette Boney reminded him that he had been able to raise \$70,000 before and asserted that he should be able to get \$50,000 this time (Tr. 2.56-2.57; Gov. Ex. 6). The recording of that conversation was also played for the jury.

Roger Godino, a forensic chemist employed by the Drug Enforcement Administration, analyzed the tablets contained in the suitcase seized by the agents at Kennedy Airport on December 21, 1976. He found that the tablets, indeed, contained methaqualone (Tr. 2.203-2.207).

4. The Appellant's Challenge to Venue

After two trial days, the Government rested (Tr. 2.219). The appellant did not call any witnesses or offer any evidence. At the close of the Government's case, appellant's counsel, for the first time, raised the issue of venue as to Count Three of the indictment, although he made no motion based on improper venue (Tr. 2.224). Judge Mishler found that any objection to venue was untimely and that, accordingly, the point was waived (Tr. 3.13-3.15). As the Court stated to the Assistant United States Attorney:

"Now your statement at the outset that you wanted to add the conspiracy charge, because there was doubt in your mind as to whether you could sustain venue on Count Three . . . was noticed [sic] directly and at a time when the defendant could have moved to dismiss Count Three, at that point. By doing that, you fully advised him of the venue question. No motion was made. As a matter of fact, no motion was made even at the end of the Government's case" (Tr. 3.15).

B. The Conspiracy Trial

The trial on Count Four of the indictment charging Annette Boney and Stuart First with conspiring together and with others to distribute methaqualone began on September 26, 1977. Once again, the Government's prin-

cipal witness was Michael Cantor.³ Cantor met Stuart First in the spring of 1976 (Tr. 32). First was then working as a territorial salesman for Cantor's sweater company in the Southwest (*Ibid.*). First said that he had a connection for methaqualone in Texas (Tr. 33). On October 22, 1976, he introduced Cantor to Annette Boney at a showroom in Dallas (Tr. 34-35). Boney told Cantor that she knew that he was interested in buying qualudes and agreed to sell Cantor twenty thousand tablets at \$1.95 per pill (Tr. 35-36). On October 30, 1976, Annette Boney arrived with Stuart First at Cantor's apartment with the qualudes. Cantor paid Boney \$39,000 for that delivery (Tr. 37-39).⁴

On November 6, 1976, Annette Boney suggested to Cantor that he buy a gun for the purpose of protecting the money he carried in connection with their drug enterprise. Thereafter, the two of them went to a gun store in Dallas and purchased a Browning pistol (Tr. 41-42).⁵

At the end of November, Boney telephoned Cantor to say that she had an additional 24,000 pills for him (Tr.

³ By this time, Cantor had already been sentenced by Judge Mishler to a four month term of imprisonment plus thirty-two months probation and was serving his sentence. (Tr. 31).

"Tr." references are to the trial transcript of September 26 through September 28, 1977.

⁴ Cantor's account of this transaction was corroborated by the Government's witness, Jeffrey Oberman, who testified that he was in Cantor's apartment when appellant and Stuart First arrived with two valises. (Tr. 167-169).

⁵ Another Government witness, A. J. Reed, who owned a gun store in Dallas, made an in-court identification of Annette Boney as the woman who purchased a Browning pistol from his gun store in November 1976 (Tr. 275-277). A form which Annette Boney filled out when she purchased the weapon was received in evidence (Tr. 277; Gov. Ex. 12).

42-43). A day or two later, Cantor met her at LaGuardia airport and took her to the Plaza Hotel in Manhattan. When they arrived at the hotel, Boney gave the 24,000 methaqualone tablets to Cantor (Tr. 44). The reservation card from the Plaza Hotel was received in evidence (*Ibid.*).

Cantor, as in the first trial, related his telephone conversation with Annette Boney in which she informed him that she had shipped about 25,000 methaqualone tablets to Kennedy airport by Emery Air Freight (Tr. 45-46). The recording of that conversation was received in evidence and played for the jury (Tr. 49, 52). Cantor also related that on the evening of December 21, he went to Kennedy airport with agents of the Drug Enforcement Administration and picked up the suitcases containing about 25,352 qualudes (Tr. 53-54).

As in the May trial, the recording made on December 28, 1976, between Cantor and Annette Boney was received in evidence and played for the jury (Tr. 54-58). Cantor also related a conversation that he had on December 28 with Annette Boney and Special Agent Gerald Graffam of the Drug Enforcement Administration (who was operating undercover) during which Boney made a demand for \$50,000 that Cantor owed her for the tablets that had been seized at the airport (Tr. 58-59).⁶

Agent Lloyd N. Clifton of the Drug Enforcement Administration testified that on August 18, 1977, he executed a search warrant at a clandestine laboratory in Dallas, Texas, and recovered large quantities of chemicals,

⁶ Agent Graffam corroborated Cantor's version of this conversation, which took place at appellant's hotel room (Tr. 176-180, 186-187). Graffam testified that he told Boney that he had been held up at gunpoint, that the qualudes which Boney had sent to Kennedy airport had been stolen, and that Boney asked Cantor to make efforts to raise the \$50,000 (Tr. 179-187).

machinery, and glassware (Tr. 201). Agent Clifton testified that he had the laboratory under surveillance from February 1977 until the warrant was executed and that in the course of his surveillance he saw four people go in and out of the laboratory (Tr. 218).

The Government also called Dr. Edward Franzosa, a forensic chemist employed by the Drug Enforcement Administration. The Government gave all the work papers of Dr. Franzosa's it then had to appellant's counsel the morning before trial and gave the balance of the Jencks Act material to defense counsel before Dr. Franzosa took the stand. (Tr. 238). Before Dr. Franzosa testified, Judge Mishler told appellant's counsel: "After the examination of Dr. Franzosa, you tell me if you want a continuance, to give you an opportunity to get an expert" (Tr. 239). No motion for a continuance was made.

Dr. Franzosa testified that he visited the clandestine laboratory in Dallas, Texas, that Agent Clifton testified about. While he was there, he found numerous pieces of chemical apparatus, a sixteen-station tablet punchpress, and large quantities of chemicals, including methaqualone. On the basis of what he found, Dr. Franzosa reached the conclusion that the product of the laboratory was methaqualone (Tr. 242-244). By using the tablet press found in the laboratory, Dr. Franzosa was able to make approximately 1100 placebo tablets, which were received in evidence (Tr. 245-257). Each of the tablets bore the legend "RORER 714", which was inscribed by steel punches. (Tr. 249). Dr. Franzosa made a microscopic comparison of the punch marks on the placebo tablets with a sample of tablets taken from the suitcase which the agents recovered at Kennedy airport on December 21, 1976. Those tablets bore the same legend. By comparing the microscope tool marks such as lumps, nicks, gouges, and ridges on the face of the tablets, Dr. Franzosa reached

the conclusion that the tablets in the suitcase were made on the punches which he found in the laboratory in Dallas (Tr. 262-263).

Stuart First testified in his own behalf. In addition, he called an alibi witness, Richard Ruster. Annette Boney did not call any witnesses or offer any evidence.

ARGUMENT

POINT I

The evidence was sufficient to sustain appellant's conviction on Count Three.

A. Introduction

Count Three of the indictment reads as follows:

On or about the 21st day of December 1976, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendant ANNETTE BONEY did knowingly and intentionally possess with intent to distribute approximately 20 kilograms of methaqualone, a Schedule II controlled substance.

In the face of overwhelming evidence that appellant possessed the methaqualone, she now claims that the evidence failed to establish possession in the Eastern District of New York. As we show below, the evidence established that appellant was in constructive possession of the methaqualone shipment in the Eastern District.

The evidence as to Count Three can be briefly summarized. On December 21, 1976, Annette Boney had the following telephone conversation with Michael Cantor:

Boney: I've got a package there waiting for you for the samples I sent down from the spring samples.

Cantor: Yeah where are they?

Boney: O.K., you just need to go pick it up, it's you know in the company name with the and it's down at Emery Air Freight at JFK.

Cantor: Emery Air Freight at JFK?

Boney: Right and it's to your attention.

Cantor: O.K. where downtown office.

Boney: Ahm it's probably out at the airport it's cause I told them it'd be a pickup.

* * *

Boney: Right, I'm just going to leave it with you ah there's twenty-five six.

(Tr. 2.14-2.16; Gov. Ex. 3, 3A).

That evening, Cantor went to ^{SEIZED} Kennedy Airport with two DEA agents. There they ~~reached~~ the package that Annette Boney had described. It contained about 25,000 tablets of methaqualone. The writing on the package appeared to be in appellant's handwriting. During the next few weeks, Boney made numerous demands for payment for the qualudes, amounting to \$50,000.

B. Appellant constructively possessed the methaqualone in the Eastern District.

The evidence established that appellant was in constructive possession of the methaqualone from the moment she delivered it to her agent, Emery Air Freight, until it was received by Cantor and the DEA agents at Kennedy Airport.

When one delivers goods to a common delivery, he maintains constructive possession. ^{lose}

goods. See, *National Screen Serv. Corp. v. United States Fidelity & G. Co.*, 364 F.2d 275, 278-279 (2d Cir. 1966); see also, *United States v. Gitlitz*, 368 F.2d 501 (2d Cir. 1966), cert. denied, 386 U.S. 1038 (1967). Since appellant chose and commissioned Emery Air Freight to deliver the contraband to Cantor at a specified location in New York and then turned the contraband over to Emery Air Freight for that purpose, it is clear that Emery Air Freight was acting as appellant's agent until it had completed the delivery for which it was hired. Nor can appellant persuasively argue here that the transfer of contraband to an unwitting agent, in this instance a common carrier, for delivery to a presumed accomplice (whom appellant instructed as to the manner of receipt) should somehow allow her to escape liability for possession in the course of her agent's delivery.

Moreover, under the criteria commonly employed by this Court, the evidence established a proper basis for finding that appellant was in constructive possession of the suitcase containing methaqualone until the assigned delivery by Emery Air Freight had been completed. Thus, this Court has held that if a defendant has "set the price for sale," has been "able to assure delivery," or has "had the final say as to means of transfer," then there is a proper basis for finding that the defendant was in constructive possession of the goods. *United States v. Jones*, 308 F.2d 26, 30 (2d Cir. 1962); see also, *United States v. Steward*, 451 F.2d 1203, 1207 (2d Cir. 1971); *United States v. Febre*, 425 F.2d 107 (2d Cir.), cert. denied, 400 U.S. 849 (1970). An affirmative finding as to any one of these factors is sufficient to convict the defendant on the basis of constructive possession. *United States v. Jones*, *supra*, 308 F.2d at 30.

Here, the evidence showed that Annette Boney set the price for sale of the qualudes and was able to assure

delivery. Cantor testified that Boney set the price for the qualudes at about \$1.95 per tablet or \$50,000 for the entire shipment. In addition, appellant assured delivery of the drugs to Cantor by naming him as the consignee.⁷ Appellant remained in constructive possession of the methaqualone until Cantor and the agents picked it up. In sum, there was a firm basis for finding that she possessed the drugs in the Eastern District.⁸

⁷ Appellant also asserts that under the Federal Bills of Lading Act, 49 U.S.C. § 81, *et. seq.*, the consignee would have title to the suitcase and its contents once it was delivered to the common carrier and that, accordingly, appellant could not constructively possess the suitcase while it was in the carrier's custody. We note that, contrary to appellant's assertion (Br. 16), the bill of lading, although turned over to the defense, was not introduced into evidence.

Appellant's reliance on rights of title arising under the Federal Bills of Lading Act misses the point. The issue of constructive possession for purposes of criminal liability does not necessarily turn on esoteric questions of continuing ownership or title. Obviously, one can possess goods in which he has no legitimate property interest. Indeed, 21 U.S.C. § 881 provides that "no property right shall exist . . . in controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter." Apparently, under appellant's theory that such questions of lawful title are dispositive (Br. 17), this statute would bar the conviction of anyone for constructive possession of controlled substances. In short, it is obviously not Congress's intention to allow civil statutes to be invoked, as appellant does in pointing to the Bills of Lading Act, in order to avoid liability under the criminal laws.

⁸ There is, of course, no question that this case was properly brought in the Eastern District since this was a continuing offense, begun in Texas and completed in the Eastern District. As Section 3237(a) of Title 18, United States Code provides:

[A]ny offense against the United States beginning in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

[Footnote continued on following page]

C. The Court's charge on constructive possession was proper

There is also no merit to appellant's contention that the trial judge misinstructed the jury on constructive possession. Judge Mishler charged the jury as follows:

One having title to and in actual possession of merchandise who thereafter ships the merchandise by carrier of his or her own choosing, to a purchaser, with instructions to the purchaser as to how and in what manner to receive the merchandise, retains constructive possession of the merchandise until delivery.

So, in this case, if the Government proves beyond a reasonable doubt that the accused had actual possession of the methaqualone and that sometime on or about December 17th, 1976, that she shipped the qualudes via Emery Air Freight, and that she chose Emery Air Freight as the carrier and addressed the same to Michael Cantor, with

Moreover, any claim of improper venue was waived. It is settled law that "when . . . statements by the prosecutor clearly reveal [a defect as to venue] but the defendant fails to object," an objection as to venue is waived. *United States v. Price*, 447 F.2d 23, 27 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971); *see also*, *United States v. Rivera*, 388 F.2d 545 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968). "Such an objection must be made at least prior to the close of the Government's case. *United States v. Fabric Garment Co.*, 262 F.2d 631, 641 (2d Cir. 1958), and perhaps before the trial begins, *United States v. Jones*, 162 F.2d 72, 73 (2d Cir. 1947)." *United States v. Polin*, 323 F.2d 549, 557 (3d Cir. 1963). *See also*, *United States v. Miller*, 246 F.2d 486, 488 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957). As Judge Mishler found in denying defense counsel's untimely objection to venue made at the end of the trial, the Government "fully advised him of the venue question. No motion was made. As a matter of fact, no motion was made even at the end of the Government's case" (Tr. 3.15).

instructions as to how and where to pick up the methaqualone, I charge you if you find all that, then as a matter of law, the defendant retained constructive possession, even though she had surrendered actual possession. (Tr. 3-82-3.83).

As discussed above, one cannot escape criminal liability for possession of controlled substances by appointing an innocent agent to deliver the drugs to one's presumed or actual accomplice. Appellant would have this Court hold otherwise by finding that Annette Boney surrendered both actual and constructive possession of the qualudes when she delivered them to her agent, Emery Air Freight. Such a result would be preposterous. Obviously, she constructively possessed the qualudes from the moment she gave them to her agent with instructions to deliver them to Michael Cantor until the carrier relinquished possession to Cantor in accordance with her instructions. Judge Mishler instructed the jury accordingly. His charge was entirely proper.

POINT II

The district court properly allowed Dr. Franzosa's testimony at the conspiracy trial.

Appellant claims that the district court's admission of the testimony of Edward Franzosa, an expert witness called by the Government at the trial on the conspiracy count, constituted reversible error because appellant allegedly received inadequate notice of the Government's intention to offer his testimony. As we show below, the claim is without merit.

Dr. Franzosa, a forensic chemist with the Drug Enforcement Administration, testified about a microscopic comparison that he made of the tablets appellant shipped to Kennedy Airport on December 21, 1976, with tablets

produced at a clandestine methaqualone laboratory discovered in Dallas, Texas. His testimony can be briefly summarized.

On August 18, 1977, Dr. Franzosa made an inventory of chemicals and equipment seized by agents of the Drug Enforcement Administration pursuant to a search warrant in a building in Dallas. In addition to large quantities of chemicals, including methaqualone, laboratory glassware, and other equipment, he found a tableting machine capable of producing between 5 million and 10 million methaqualone tablets per day. (Tr. 242-244; 248). The machine produced scored tablets bearing the inscription "RORER 714", which was made by steel punches. Dr. Franzosa made a number of placebo tablets on the machine. The DEA agents who, with Michael Cantor, seized the suitcase containing methaqualone tablets at Kennedy Airport on December 21, 1976, sent 300 of those tablets to Dr. Franzosa. Those tablets also bore the inscription "RORER 714". Using a stereo microscope, Dr. Franzosa visually compared the lumps, nicks, gouges and ridges made by the steel punches on each set of tablets (Tr. 259-261). His examination showed that the tool marks on the placebo tablets and the methaqualone tablets seized at Kennedy Airport were identical and, therefore, must have been made by the same punches (Tr. 263).

On the first day of trial, September 26, 1977, the Assistant United States Attorney told appellant the substance of Dr. Franzosa's proposed testimony (Tr. 238).⁹ The Assistant did not receive Dr. Franzosa's written test report until the following day and immediately gave a

⁹ The Assistant United States Attorney learned about Dr. Franzosa's examination in mid-September 1977, about a week or 10 days before trial (Tr. 238) and decided to call him as a witness only a few days before trial.

copy to defense counsel (*Ibid*). Only after receiving the report did appellant object to Dr. Franzosa's testimony. Judge Mishler then offered her a continuance in order to get her own expert (Tr. 239). As Judge Mishler stated: "After the examination of Dr. Franzosa, you tell me if you want a continuance, to give you an opportunity to get an expert" (*Ibid*).

Instead of requesting a continuance, appellant chose to rely upon the cross-examination of Dr. Franzosa. She never requested a continuance.

Even if Appellant was prejudiced by the lack of pre-trial notice of Dr. Franzosa's proposed testimony, any such prejudice could have been cured by appellant's accepting the Court's offer to interrupt the trial. In view of her failure to accept that offer, appellant cannot now claim that the lack of advance notice entitles her to a new trial. *United States v. Russo*, 480 F.2d 1228, 1243 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974).

In any event, Dr. Franzosa's testimony was a relatively insignificant piece of evidence in the totality of the Government's overwhelming case of appellant's guilt. Thus, Michael Cantor testified that he and Annette Boney conspired together in connection with three separate drug transactions during the course of the conspiracy and one additional transaction after Cantor became a Government informant. Annette Boney's involvement was corroborated by tape recordings of conversations with Cantor and by admissions that she made to Special Agent Gerald Graffam. In addition, the DEA agents seized over 25,000 methaqualone tablets which Annette Boney shipped to Kennedy Airport. She admitted that it was she who had sent them in a tape recorded conversation which was received in evidence. Cantor's testimony was further corroborated by various documents, including hotel registration records. In sum, Dr. Franzosa's testimony was

merely cumulative of the other evidence amply establishing appellant's participation in the conspiracy with Cantor and others.

In support of her claim that the Government's failure to notify her before the first day of trial of Dr. Franzosa's examination constituted reversible error, she relies upon *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969). That case is readily distinguishable from the instant case. In *Kelly*, the Government deliberately refused to furnish the results of a novel and highly sophisticated scientific test which took some three to four weeks to perform. When defense counsel requested a month's continuance to meet that part of the Government's evidence, the trial judge denied the application. 420 F.2d at 28. Here, no request for a continuance was made even though the Court invited appellant to move for additional time. Moreover, the scientific examination involved in the instant case consisted of nothing more than a visual, microscopic comparison of the tool marks on two sets of tablets. The entire examination took eight hours (Ex. 3500-34). This is not the sort of test which would have required a lengthy continuance to perform. Thus, the fact that appellant was not told of the results of Dr. Franzosa's examination long in advance of trial was, at most, harmless error. See, e.g., *United States v. James*, 495 F.2d 434 (5th Cir.), cert. denied, 419 U.S. 899 (1974); *United States v. Dowdy*, 455 F.2d 1253 (10th Cir. 1972); see also, *United States v. Dioguardi*, 428 F.2d 1033, 1038 (2d Cir.), cert. denied, 400 U.S. 825 (1970).¹⁰

¹⁰ This was not, in any sense, a trial by ambush—a tactic condemned by this Court in *United States v. Baum*, 482 F.2d 1325, 1332 (2d Cir. 1973). Here, the Government did not deliberately withhold evidence from the defense. The reason disclosure was not made substantially in advance of trial is that the tests themselves were not made until September 9, 1977; the attorney for the Government did not learn about them until a week to ten

[Footnote continued on following page]

Appellant also claims for the first time that she was prejudiced by the failure of the Government to produce the steel punches which made the tool marks on the tablets. Appellant never requested that the punches be produced. And, of course, she never asked for a continuance to allow the Government to produce them. Moreover, the punches themselves played no part in Dr. Franzosa's examination. His examination was the equivalent of a ballistics examination of bullets fired from a gun (Tr. 260). Just as a ballistics expert does not examine the gun itself in making his comparison, Dr. Franzosa—or any other expert comparing the two sets of tablets—did not need to examine the punches. Thus, there is no merit to appellant's claim that she was prejudiced by the fact that the punches were unavailable for inspection. Finally, as discussed above, the evidence derived from the test was insignificant in light of the overwhelming proof of appellant's guilt from numerous independent sources.

In sum, appellant's assertion that she is entitled to a new trial on the conspiracy count is without merit.

days before trial, decided to call Dr. Franzosa as a witness only a few days before trial, and did not receive the reports themselves until the second day of trial (September 27, 1977). The failure to make disclosure immediately upon deciding to call Dr. Franzosa as a witness was inadvertent. In any event, disclosure was made on the first day of trial.

POINT III

The procedure by which methaqualone was added to the schedule of controlled substances is Constitutional.

Appellant argues that the procedure by which methaqualone was added to the Schedule II list of controlled substances was an unconstitutional delegation of legislative authority to the Attorney General. This Court squarely rejected that very claim in *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977). The fact that *Pastor* involved drugs added to Schedules III and IV, whereas methaqualone was added to Schedule II, is irrelevant to the issue of whether or not the statutory scheme is Constitutional. In light of *Pastor*, appellant's argument is frivolous.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
December 20., 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of January 1978 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Rothblatt, Rothblatt, Seivas & Peskin

232 West End Ave.

New York, N.Y. 10023

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

3rd day of January 1978

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1979